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No. 73.

OCTOBER TERM, 1930.

IN THE

Supreme Court of the United States

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY,
Defendants-Appellees.

REPLY BRIEF FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, DEFENDANTS-APPELLEES.

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DECEMBER, 1930.

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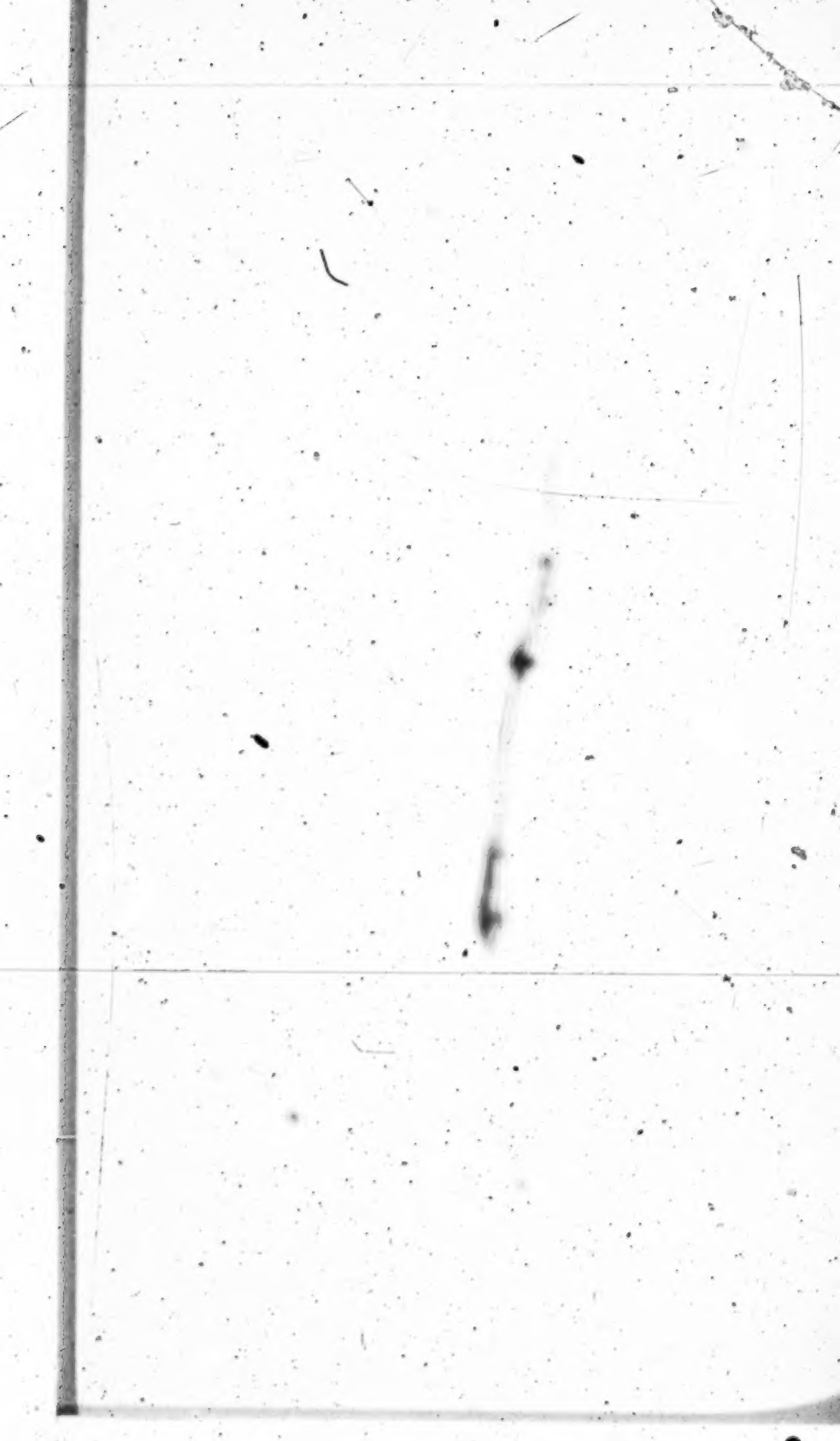
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In the Supreme Court of the United States.

No. 73 of October Term, 1930.

Chesapeake and Ohio Railway Company, Plaintiff-Appellant,

v.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company, Defendants-Appellees.

REPLY BRIEF FOR GUYANDOT AND TUG RIVER RAILROAD COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY, DEFENDANTS-APPELLEES.

COUNTER STATEMENT OF THE CASE.

A counter statement is deemed necessary to correct inaccuracies or omissions which we con-

ceive exist in the statement of the case by the Chesapeake and Ohio Railway Company.

On May 7, 1925, the Chesapeake and Ohio Railway Company filed, under Paragraph (18), Section 1, Interstate Commerce Act, an application with the Interstate Commerce Commission (F. D. 4818) for a certificate of public convenience and necessity for the construction of a railroad from the terminus of its Logan sub-division near Gilbert, W. Va., in an easterly direction 47.3 miles to a point near Mullens, W. Va., and an extension of its Winding Gulf Branch from its terminus near Stonecoal, W. Va., westerly to a point near Mullens, 8.2 miles, where the two extensions would join. This did not cover the Railroad now in question.

On October 29, 1925, the Guyandot and Tug River Railroad Company, a subsidiary of the Norfolk and Western Railway Company, with the Norfolk and Western Railway Company and the Virginian Railway Company joining, filed an application (F. D. 5161) for a certificate of public convenience and necessity to construct a line of railroad from a connection with the Virginian Railway Company near Elmore westwardly down the Guyandot River to Gilbert and thence to Wharncliffe, about 53 miles, including the 10½ miles (Gilbert-Wharncliffe) now in controversy. An amended application

was filed December 24, 1925, by the Guyandot and Tug River Railroad Company and the Norfolk and Western Railway Company for the same Line, 53 miles.

On January 21, 1927, the Virginian and Western Railway Company filed an application, the Virginian Railway Company joining, for a certificate to authorize the construction of a line of railroad from the terminus of the Virginian Railway Company on the Guyandot River near Itmann down the River to Gilbert, about 40.6 miles.*

The line along the Guyandot River sought by each of the applicants between Gilbert and Mullens, Elmore or Itmann was the same in location in a narrow valley; but only the Norfolk Company and its subsidiary sought authority to build a line of railroad between Gilbert and Wharncliffe.

The three applications were heard in the same hearing, in the sequence of the dates of the applications. The Examiner announced that "all parties can refer to any testimony or statements in the transcripts as long as they relate to the one general subject" and recited the stipulation as "by all parties that all evidence

*For brief reference we shall hereafter designate the Chesapeake and Ohio Railway Company as the Chesapeake Company; the Norfolk and Western Railway Company and its subsidiary the Guyandot and Tug River Railroad Company as the Norfolk Company; and the Virginian Railway Company and its subsidiary the Virginian and Western Railway Company as the Virginian Company.

taken in the transcript shall be equally available to all parties and may be considered by the Commission in disposing of each and all of the applications"; (R. p. 113).

The Virginian Company supported that part of the Norfolk's application which sought authority for the Gilbert-Wharncliffe line. The only opposition to the construction of that line has come from the Chesapeake Company.

The three applications were covered by the Commission in one report and disposed of by one certificate and order of 23rd July, 1928, (145 I. C. C. 167).

The certificate granted to the Virginian Company the right to construct its line in the main Guyandot Valley from Itmann to Gilbert; to the Norfolk Company to build that portion of its proposed line extending from Gilbert to Wharncliffe; denied the application of the Norfolk Company as to other matters; and denied *in toto* the application of the Chesapeake Company; (145 I. C. C. 167); (R. pp. 64-66).

The Chesapeake Company petitioned the Commission for reconsideration and reargument of the entire proceeding, and that petition was denied (R. pp. 242-3). Then, accepting the decision as to the line from Itmann to Gilbert, the Chesapeake Company filed its further petition for

reconsideration and reargument as to the certificate granted to the Norfolk Company for the Gilbert-Wharncliffe line. Pending consideration of that petition, the effective date of the certificate and order was postponed insofar as it authorized the Gilbert-Wharncliffe line (R. p. 243); but the petition was denied and the certificate and order was made effective November 1, 1928 (R. p. 244). The order required the Norfolk and Virginian Companies to commence work on the authorized lines prior to January 1, 1929, and complete the railroad on or before December 31, 1931 (R. p. 240).

A petition for injunction (R. pp. 1-31) was filed by the Chesapeake Company on 8 December, 1928, in the District Court for the Southern District of West Virginia, to restrain and set aside only that part of the certificate and order of the Commission of 23 July, 1928, and of subsequent orders, which authorized the construction of the Gilbert-Wharncliffe line by the Norfolk Company. This case was heard January 3, 1929, on the application for a preliminary injunction, by a three-Judge Court under The Urgent Deficiencies Act of 22 October, 1913, and was at that hearing submitted by consent of all the parties as on final hearing for a permanent injunction; (R. pp. 78-80).

On November 16, 1929, the District Court denied the injunction and dismissed the petition of the Chesapeake Company: 35 Fed. (2d) 769. Final Decree December 14, 1929 (R. p. 97). From the decree of the District Court the Chesapeake Company obtained an appeal to this Court. There was no supersedeas. The order of the Commission of July 23, 1928, is now and has been in effect since November 1, 1928; (R. p. 86).

SPECIFICATION BY APPELLANT OF THE ASSIGNMENTS OF ERROR TO BE URGED.

The eight Assignments of Error are printed in the Record, pp. 98-101, and reprinted as an Appendix to the Brief of the Appellant, pp. ix-xii. At page 28 of the Brief of the Appellant is the statement that "all are relied upon."

The rule of this Court (Rule 27, sub-division (*e*)) requires "a specification of such of the assigned errors as are intended to be urged." The specification on page 28 of the Appellant's Brief doesn't specify any particular assigned error and asserts that the Assignments of Error challenge the validity of the certificate by "the Commission upon the respective grounds

stated therein, which, summarily stated, are: (1) that neither the findings of the Commission and the court nor the evidence in the record afford any substantial support for the Commission's order; (2) that the record proves the construction complained of in this suit to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law; and (3) that the decision of the court below that authority for the Virginian's Itmann-Gilbert line was contingent upon construction of the Guyandot's Gilbert-Wharncliffe line was erroneous because squarely in conflict with conclusive proof to the contrary."

Here also there is no specification to distribute the three grounds relied upon and associate them with particular Assignments of Error.

Neither in the Summary of Argument (pp. 29 to 46 of the Appellant's Brief) nor in the Argument (pp. 46 to 68 of the Appellant's Brief) is there reference by number to the Assignments of Error with which the points are sought to be associated.

In the "Statement of Points on which Appellant Intends to rely" (R. pp. 253-5) Errors I and VIII are not mentioned and Errors II to VII of the Assignment of Errors are associated with Points as follows:—

Assignment No. II:—

No evidence to justify the Certificate:

Assignment No. III:—

The Record proves that the construction will be contrary to public convenience and necessity:

Assignments Nos. IV and V:—

Certificate without authority of law because "based upon an erroneous conception and theory of the law" in that the Commission's action "was solely based upon the naked finding that the construction thereby authorized would promote competition between carriers and assure competitive service" without any evidence or finding that "such promotion of competition or assurance of competitive service was or will be required by present or future public convenience and necessity."

Assignment No. VI:—

Certain evidence found by the District Court as sufficient to support the order was not so in fact or in law:

Assignment No. VII (seemingly a mistake for Assignment VIII):—

The order was separable as to the Wharncliffe Line.

ARGUMENT.

I.

(Assignments of Error II, III, IV, V, VI and VII.)

The evidence established that the Wharncliffe Line was essential for the public convenience and necessity:—

(1) As affording and maintaining the existing carrier competition by an alternative outlet Line to the West for traffic originating on existing lines:

(2) As affording required service for the territory traversed by the proposed new line:

(3) As enabling the Virginian Company to attain the expected profitable use of its new Line in the Guyandot Valley:

(4) As enabling the Norfolk Company to make economies in the transportation of coal to the West from Virginian mines:

(5) As enabling the Norfolk Company to participate in the new business originating in the Guyandot Valley along the new line of the Virginian Company:

(6) As securing freedom of outlet to the west for the Virginian Company.

(Point 3, Appellant's Brief, pp. 32-41; Assignments of Error Nos. II, III, IV, V and VI—(see R. pp. 253-5).

If there is any substantial evidence upon which the Commission's administrative jurisdiction can act this Court will not substitute its judgment for that of the Commission: MANUFACTURERS' RAILWAY v. U. S., 246 U. S. 457.

A presentation of the evidence supporting the award of the certificate here follows:—

(1) *The Wharncliffe Line is necessary to preserve the existing competitive status of the Norfolk and Chesapeake Companies for the westbound movement of coal originating on existing lines.*

(Assignment of Error VI:—Point 2 of the Summary of Argument (p. 30) and Point 2 of the Argument (p. 51) in Appellant's Brief.)

The existing lines of the Virginian Company extend from Norfolk, Va., on the east to the West Virginia coal fields, with several branches in the coal fields upon which coal is produced and shipped (R. p. 34). During the first nine months of 1927, there were in operation on its lines 47 coal mines served by it alone (called local mines) and 55 coal mines served also by the Chesapeake Company (called joint mines), and those mines produced and shipped coal via the Virginian Railway during that period

amounting to 9,211,045 tons, or at the rate of about 12,281,528 tons per annum (R. p. 160).

The Virginian has no rails extending west from the coal fields. During the first nine months of 1927, 3,203,793 tons of coal originated by it (equal to about 4,271,724 tons per annum) moved via other railroads to western destinations (R. p. 160).

For the movement of coal from some of the origins on existing lines of the Virginian to the west, the Commission several years ago required the establishment of joint rates via the following routes: (1) Via the Virginian to Deepwater, W. Va., and thence via the Chesapeake and its connections; and (2) Via the Virginian to Matoaka, W. Va., and thence via the Norfolk Company and its connections. Wyoming Coal Co. *et al. v.* Virginian Ry. Co. *et al.*, 96 I. C. C. 359 and 98 I. C. C. 488; (R. pp. 136-7, 237). The orders in that case covered only rates from a few specific origins on the Virginian and similar joint rates were voluntarily established by the Virginian and Norfolk Companies via the Matoaka route from all mines served by the Virginian, local or joint mines. The Chesapeake Company and the Virginian Company also voluntarily established similar rates

via the Deepwater route from all local mines served by the Virginian and from such of the joint mines as were located between destinations and a local mine; but the Chesapeake Company refused to permit the establishment of joint rates via Deepwater from 27 joint mines which were not intermediate because that carrier also serves those mines with its own route to the West, and would be short-hauled via the Virginian route (R. pp. 146, 237).

The Chesapeake Company and the Norfolk Company, as connecting carriers of the Virginian via the Deepwater and Matoaka routes respectively, are active competitors for the movement of all coal originating on the Virginian Railway and destined to the West (R. pp. 138-9).

Both of the existing routes (via Matoaka and via Deepwater) have disadvantages. For example, from the principal origin territory on the Virginian (the Winding Gulf District) the line of that carrier to Deepwater and so west via Chesapeake Company crosses over three summits with adverse grades ranging from 1.10 to 1.65 per cent. against the loaded movement and 1.60 to 2.02 per cent. against the return empty movement of coal cars (R. p. 39). The route via Matoaka is about 41 miles longer than the pro-

posed route via Gilbert and Wharncliffe, and encounters an adverse grade against loaded movements of 2.07 per cent. on the Virginian and 1.10 per cent. on the Norfolk (R. p. 39).

The evidence is undisputed that a route down the Guyandot River to Gilbert, and thence west either via existing lines of the Chesapeake or the proposed Wharncliffe line (now sought to be enjoined) will be better than either of the existing routes through Deepwater or Matoaka for the movement of coal originated by the Virginian on its existing lines (R. pp. 38, 232).

The Norfolk Company's route has in the past secured approximately 80 per cent. of that traffic. Of the 3,203,793 tons moved during the first nine months of 1927, 2,741,331 tons moved via Matoaka (R. pp. 158-9).

The Commission ruled (R. pp. 56-7) that "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal," and that "The construction of that part of the N. & W's proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley."

The District Court on this phase of the justification for the line now in controversy, at pages 775-6 of its opinion (R. pp. 93-4), said:—

"The N. & W. and C. & O. are active competitors for the shipment of this amount of 4,000,000 tons, heretofore mentioned, which now originates on the Virginian lines to the west. Naturally, the Virginian would want to have the longest haul possible of this tonnage, and would therefore like to haul it from the point of origin of each ton to the end of its line at Gilbert. Without the construction of the Gilbert-Wharncliffe line, all of this coal tonnage would have to be delivered at Gilbert to the C. & O. The construction of this short line would leave the C. & O. and N. & W. upon the same competitive basis as they are at present, and would give to the Virginian what the I. C. C. evidently thought was its rightful portion of the revenue derived from the shipment of this coal. This is simply carrying out the apparent public policy indicated by Congress by the passage of the Interstate Commerce Act.

"It is claimed by the plaintiff that the C. & O. afford the 'natural' and most economical route for the movement west from Gilbert, and characterizes the proposed Wharncliffe route as a 'poor' one, having 'heavy grades' and being uneconomical and wasteful, but the I. C. C. evidently found to the contrary, and in our opinion, when all the facts are taken into consideration, there

is no doubt about the rightfulness of its conclusions."*

The Chesapeake Company urges that this competition should not be permitted because the route of the Chesapeake west from Gilbert is better and more economical than the route of the N. & W. via the Gilbert-Wharncliffe line. In this context, in its injunction petition, it characterizes the Gilbert-Wharncliffe line as "poor" having "heavy grades" and economically wasteful (R. p. 11). The evidence (Exhibit No. 25, R. pp. 208-9) shows that the maximum adverse grade will be 1.04 per cent. for a distance of about five miles. Witness Crawford (R. p. 215) described the proposed method of operating over

* In parallel columns in this note we present the characterization of the Wharncliffe Line in the Brief of the Chesapeake Company in the District Court in the case at bar for contrast with the characterization of the same Wharncliffe Line in the Brief of the Chesapeake Company filed in opposition to the granting of a certificate to the Virginian Company for the construction of a bridge at Deepwater (F. D. 7562).

Page 118 of brief for Chesapeake Co. in F. D. 7562 filed with I. C. C. Oct. 24, 1929:

"Upon the whole record it is conservative to say that the westbound route of the C. & O. via Gilbert will be a route of extraordinary efficiency, capable of handling all traffic that may be offered it; and if the Gilbert-Wharncliffe Line is built another route, almost as efficient will be available."

Page 30 of Brief for Chesapeake Co. filed in District Court, dated Jan. 3, 1929:

"On the contrary, the facts thus far related—the cost of the line, its heavy grade, the necessity for doubling and the excessive cost of its operation, as contrasted with the superior grades, lesser cost of operation and entire adequacy of the Logan Subdivision—appear conclusively to demonstrate the useless wastefulness of the proposed construction."

that grade and testified that it would add less than one cent a ton to the cost. Witness Marshall (R. p. 203) estimated the "direct train service costs" via the route of the Chesapeake and via the proposed Gilbert-Wharncliffe line and testified that the latter would be only 90 cents per car (less than 2 cents per ton) more costly than the route of the C. & O. That witness also showed certain other expenses for the Chesapeake and Norfolk Companies (R. pp. 191-2) from which it will appear that the costs of locomotive and freight car repairs, depreciation and retirements are greater on the Chesapeake Company than on the Norfolk Company, to an extent more than sufficient to overcome an advantage of less than 2 cents a ton.

The new route via Wharncliffe would be more economical and advantageous than the existing route through Matoaka and the Matoaka route must be continued and will be used for large tonnages unless the Wharncliffe line is constructed. The economies which will result from the substitution of the Gilbert-Wharncliffe route for that traffic alone are sufficient to justify the construction of the line in controversy. It is not important that greater economies might result from the use of the Chesapeake's route for diversion of the traffic to a route of the Chesapeake is not practicable.

of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in."

The Chesapeake Company relies upon TEXAS & PAC. RY. v. GULF, ETC., RY., 270 U. S. 266. At page 277 this Court said that "competition between carriers may result in harm to the public as well as in benefit." This language recognizes that the creation or continuance of competition may justify a certificate. The question is for the Commission on substantial evidence in the exercise of its administrative discretion in each particular case, and in the present case it has found, from convincing evidence, that the preservation of the existing competition is required by the public convenience and necessity.

This position of the Appellant originated with the dissenting opinion of Commissioner Porter (R. pp. 58-64). This Commissioner would have denied the certificate because "the Norfolk and Western is seeking to build into new territory adequately and efficiently served by other carriers," a statement made under a mistake of fact. The certificate for the Gilbert-Wharncliffe Line and the construction and operation of that line will not take one ton of freight or a single passenger from the Chesapeake Company's line to

Gilbert now moving by that line. The objection of the Chesapeake Company arises from a desire to divert to its own route as much as possible of the tonnage of coal now moving from Virginian mines to the West via Matoaka Junction and the Norfolk route. The Chesapeake's claim (R. p. 245) of $450,000.00 loss is based upon the hope of snatching from the Norfolk Company all or most of the transportation from Virginian sources now enjoyed by the Norfolk route.

The territory of construction is not served by any carrier at the present time. The Wharncliffe Line was authorized in part by the Commission because, as the District Court neatly observed (35 Fed. (2d) 773), "This, in effect, would result in continuation of approximately the same conditions now existing." Continuing, not creating, competition is the result of the Wharncliffe certificate.

So much for Appellant's positions upon the evidence. Now let us look at some of the authorities cited in B-2 of the Appellant's Brief and see whether they apply to such a status as in the case at bar.

At p. 58 TEXAS & PAC. RY. v. GULF, ETC. (270 U. S. 266), is cited. This case has already been noticed. The certificate in this case will accomplish the "preservation of the earning

capacity" of the Norfolk Company emphasized in that case by preventing the Chesapeake Company from diverting coal tonnages which now move via the Norfolk route.

At p. 59, the same case is quoted as condemning "invasion through new construction of territory adequately served by another carrier". The territory traversed by the new line of the Virginian and the line of the Norfolk now sought to be enjoined has never been served by any railroad.

At p. 62 is a quotation from a statement of Mr. Edgar E. Clark, of the Interstate Commerce Commission, addressed to a Committee of Congress in the context of the consideration of a Bill now incorporated as Paragraphs (18) and (20) of Section 1 of the Interstate Commerce Act. Mr. Clark explained that the proposed law would prevent the building of *duplicate* lines of railroad not needed which would "simply depend for traffic upon that which they can get away from railroads already built," thus adding to the burdens of the public for maintenance.

The Gilbert-Wharncliffe line is not a duplicate of any existing line but traverses a territory which has heretofore been without railroad service. There is no evidence that the new line will take a ton of freight or a single passenger

from any other existing line. Its principal use will be in hauling newly developed traffic or more advantageously transporting existing traffic now moving over other lines of the Norfolk Company.

The Chesapeake Company plans to be the sole connection of the Virginian west from Gilbert for traffic "which they can get away from railroads already built"—that is, from the Norfolk Company.

The UTAH TERMINAL CASE (72 I. C. C. 89), is quoted (p. 65), as negativing "any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies."

The facilities must be "existing" and "adequate." No railroad facilities were in existence in the Guyandot Valley between Gilbert and Itmann. The Line authorized in that Valley for construction by the Virginian Company will be the only Line there. That Line is not competitive with the Chesapeake Company or any other railroad in that area.

The Wharncliffe Line will not be a competing Line with the Chesapeake Line for a pound of traffic or a passenger now moving over the Chesa-

peake Line west from or east to Gilbert. *The Chesapeake Line was a dead end and would have continued so but for the certificate of the Commission issued to the Virginian Company.*

It would indeed have been a strange distortion of the phrase of the statute "public convenience and necessity" for railroad service if the Chesapeake Company had persuaded the Commission to deny in part adequate service in an area theretofore without any railroad service; and to refuse authority to the Norfolk Company to construct a line needed to maintain and transport its existing traffic more economically and advantageously; to enable the Virginian to make adequate use of its Guyandot Line; to serve shippers from joint mines; and to serve the coal development of the future in the area traversed by the Gilbert-Wharncliffe line.

(2) *The Wharncliffe Line is required for the development in the future of coal-bearing lands tributary to that line on Gilbert and Horsepen Creeks.*

The opinion of the District Court gives this resumé of this phase of the evidence and the Court's conclusion thereon (35 Fed. (2d) 775):

> "There is substantial evidence that in this 10½ miles from Gilbert to Wharncliffe there is a large tonnage of mineable coal which

witnesses estimated to be from 120,000,000 to 175,000,000 tons, and there is evidence of witnesses to show that this can best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. The I. C. C. found this to be true and we cannot substitute our judgment thereon, even if there were substantial evidence to the contrary. This will, of course, be a matter of future development, but the law authorizes the issuance of a certificate upon a finding by the I. C. C. that the present or future public convenience and necessity require or will require such construction."

The evidence supporting this finding is as follows: Witness Dunglinson (R. p. 226) estimated the mineable coal in the area between Gilbert and Wharncliffe at 120,000,000 tons of high volatile coal; Witness Walker (R. p. 229) estimated that there are tributary to Gilbert Creek (along which the Gilbert-Wharncliffe line extends for part of its length) 31 square miles of coal bearing land, containing 175,000,000 tons of gas coal. Witness Crawford (R. p. 217) describing the branches necessary fully to develop the resources of the territory in question, referred to the proposed Horsepen branch, about five miles in length, connecting between Gilbert and Wharncliffe, and estimated its cost as $600,000.

Our opponents (Appellant's Brief, pp. 20-21) try to balance the evidence for public convenience and necessity and disagree with the administrative conclusion announced by the Commission. One aspect of this part of the argument is interesting for particular notice in the context of service for the Horsepen Creek area. The assertion is made (Brief, p. 20) "that Gilbert and Horsepen Creeks lie in the Guyandot Valley, are tributary to the Guyandot River, and are readily accessible to development by either the Virginian's new line or appellant's Logan Subdivision, each of which follows the course of the Guyandot River and connects with the other at Gilbert." Neither the Virginian Company nor the Chesapeake Company proposed to build a line into that territory.

This is almost equivalent to a claim of the Chesapeake Company of exclusive dominion to determine when and how the mineable coal in the Gilbert Creek and Horsepen Creek areas shall receive railroad service, and to furnish that service at its pleasure in the future.

(3) *The Wharncliffe Line is required to enable the Virginian Company to attain the expected profitable use of its own Line in the Guyandot Valley.*

The Virginian Company, after filing its separate application to build the line in the Guyandot

Valley between Itmann and Gilbert, supported the Norfolk Company's application for authority for the Wharncliffe Line. In the Virginian's Reply Brief filed with the Commission on August 25, 1928, the evidence on this phase was thus marshalled:—

> "The Virginian 'has consistently favored this part of the Norfolk's application, because its large westbound tonnage from the 29 joint mines to which the C. & O. refuses westbound routes and rates must continue to move via the N. & W. route, in all probability the same conditions which now constrain enough tonnage from other mines to move by that route to make an aggregate of 80% of the Virginian's total westbound tonnage will continue to compel a large amount of tonnage from such other mines to so move, and such tonnage presently moves disadvantageously over both Virginian and N. & W. lines via Matoaka as compared with movement over the Itmann-Gilbert-Wharncliffe route.
>
> "If the economies resulting from the movement over the last named route are not equal to the 14 cents estimated by a N. & W. witness or the 12 cents estimated by C. & O. and Virginian witnesses, they will at any rate be considerable, perhaps near the latter figure. And the N. & W. and the Virginian, which must continue to move jointly a large

tonnage to the west, are entitled to realize these economies." Pages 21-22 of the Reply Brief.

The Reply Brief continues:—

"Without the Gilbert-Wharncliffe line of the N. & W., the new line" (of the Virginian) "will not have its fullest and most advantageous use, nor will the Virginian line between Elmore and Matoaka be cleared for the movement of eastbound coal from the new line nor able to defer so long the additions and betterments thereon, which increasing business will eventually demand. Not only will the Virginian be compelled to haul to Matoaka the westbound coal originating on its present lines and routed via the N. & W. but it must back haul to Elmore and Matoaka all westbound coal originating on the new line and routed by the N. & W., of which there will necessarily be some since the Virginian cannot refuse to shippers on the new line the same routes to the west as are open to others." Pages 22-23 of the Reply Brief.

(4) *The evidence establishes that the Wharncliffe Line is necessary to accomplish economies in operating costs in connection with traffic now moving by way of other lines of the Norfolk Company.*

The opinion of the District Court on this phase of the evidence is as follows (35 Fed. (2d) 775):

"It must be remembered that the greater part of the traffic which is expected to move over the line which the Virginian has been authorized to construct from Itmann to Gilbert will be coal originating on existing lines of the Virginian Railway and destined to be hauled west, and which is now moving over other routes at the rate of about 4,000,000 tons a year and is expected to increase in volume. That coal orginates at mines on existing lines of the Virginian which are either local to its rails or served jointly by the Virginian and C. & O. From the local mines, and from the joint mines which are directly intermediate, there are joint rates by way of the rails of the Virginian in connection with both the C. & O. and N. & W. through Deepwater and Matoaka respectively. From 27 other joint mines there are likewise joint rates in connection with the N. & W. by way of Matoaka, but the C. & O. has refused to join with the Virginian in establishing joint rates by way of Deepwater, because it has its own rails all the way from those mines to the western markets."

"The coal shippers from this region, for reasons of their own, have heretofore caused about eighty per cent. of all westbound coal originating on the Virginian to be moved by way of Matoaka and the N. & W., and the I. C. C., in giving its approval to the Gilbert-Wharncliffe line, has declined to deprive these shippers of the continued opportunity

to use the N. & W. lines. If the Gilbert-Wharncliffe line is not built, then the existing routes by way of Matoaka must be continued. To the extent that the shippers continue to use the Matoaka route, the use of the Itmann-Gilbert line of the Virginian will be curtailed and the participating carriers will be unable to accomplish the operating economies which would result from the use of that route."

The Commission in its report stated (R. p. 37) that "the main functions of all of the proposed lines are the same, viz: (*a*) to provide a suitable outlet for westbound traffic, chiefly coal, from the lines of the Virginian and C. & O. in the upper Guyandot basin; and (*b*) to carry the traffic to be developed by the proposed construction."* It also referred (R. pp. 44-5) to the estimates of traffic expected to move over the proposed lines submitted by the three applicant carriers, including traffic expected to be developed from points on the proposed lines and the traffic from other origins expected to move over those lines. It further stated (R. pp. 54-5) that the principal need for

*References are sometimes made herein to findings of the Commission, instead of to the evidence, because the printed record does not contain all the evidence before the Commission and the appellant, for the purpose of limiting the size of the record, has conceded that it "did not question before the District Court, and does not now question, any statement of fact (as distinguished from conclusions based on those facts) found in the report of the Commission" (R. p. 132).

the proposed line in the Guyandot Valley (apart from local service) is to provide an economical outlet for westbound coal mined in the upper Guyandot basin and that "more than two-thirds of this coal is originated by the Virginian." Witness Marshall (R. p. 160) testified that during the first nine months of 1927, there were originated on the Virginian and moved to the Wes 3,203,793 tons of coal and (R. pp. 158-9) that 2,741,331 tons of that total (or 85 per cent.) moved via routes in connection with the Norfolk Company through Matoaka, W. Va. The mines at which that coal originated are shown (R. pp. 161-8), and whether those mines are local to the Virginian Company or joint with the Chesapeake Company is shown (R. pp. 141-5). The testimony also discloses the mines from which joint rates are available via the Virginian Company in connection with the Chesapeake Company. Witness Adsit (R. p. 237) testified that the Chesapeake Company refused to permit the establishment of joint rates from certain joint Virginian-Chesapeake mines via routes of the Virginian Company in connection with the Chesapeake Company, and (R. pp. 171-2) 27 of such mines are listed with the coal moved from each via the Virginian Company through Matoaka, aggregating 1,244,915 tons during the

first nine months of 1927. Witness Hull of the Chesapeake Company (R. p. 140) stated that the Matoaka route in connection with the Norfolk Company "already exists, and will continue" to exist if the Norfolk Company's construction from Gilbert to Wharncliffe is not permitted. Witness Crawford (R. pp. 213-4) estimated that the movement of that coal via the Gilbert-Wharncliffe route would result in a saving of approximately 14 cents per ton in operating expenses.

Unless the Gilbert-Wharncliffe line is built the Matoaka route will be continued and will be the only available route from Virginian origins in connection with the Norfolk Company. The shippers of coal having shown a preference for a route via the Norfolk Company by sending over 80 per cent. of their westbound coal shipments via Norfolk routes, may reasonably be expected to utilize a Norfolk Company route for some substantial volume of traffic in the future. From 27 of the joint mines the only available joint rates for traffic originated by the Virginian are in connection with the Norfolk Company, the Chesapeake Company having refused to establish joint rates. The construction of the new line of the Virginian will not change that condition. Joint rates over that line would short-haul the Chesapeake. And that road could not be compelled to

do so under the provisions of Paragraph (4), Section 15, of the Interstate Commerce Act. Therefore, if the construction of the Gilbert-Wharncliffe line is prevented, the Matoaka route will be the only available route for the movement on joint rates of coal originated by the Virginian at those 27 mines, and would have to be used. The evidence shows that the Norfolk Company could and would, if the Gilbert-Wharncliffe line is constructed, substitute a route via that line, and that such a route would be more economical by 14 cents per ton than the existing Matoaka route.

The Chesapeake Company answers that "There is, however, no proof that appellant would avail itself of the short-haul provision of the Act and decline to open the new route to these mines." The evidence does show that it has refused to allow itself to be short-hauled by establishing joint rates via existing lines; that it would be short-hauled to the same extent via the new line; and it has never indicated a willingness to establish joint rates from those 27 mines even after the new line is completed. Surely the Commission was right in disposing of the subject of public convenience and necessity in the status as presented without leaving the 27 mine owners to the tender mercies of carrier charity opposed, in this instance, to that carrier's interest.

The Chesapeake Company also asserts (Brief, p. 35): That there is no necessity for the movement of coal from those mines via any route in connection with the Norfolk Company, via either Matoaka or Wharncliffe, because the Chesapeake has a single line route all the way from the mines to the west. But this is beside the question. Here there are two carriers serving each of those 27 mines with their own rails, the Virginian and the Chesapeake. The shipper may deliver his traffic to either for transportation. The Virginian would not retire from the handling of traffic originating at mines on its own rails (even if it could be permitted to do so) merely because the Chesapeake has a single line route of its own. If the shipper delivers the traffic to the Virginian for transportation, the single line route of the Chesapeake is not available, no other route of the Chesapeake is available because of its refusal to be short-hauled, and the only available route under joint rates is that of the Virginian in connection with the Norfolk Company.

Unless the Norfolk Company is permitted to provide a route via Gilbert and Wharncliffe, the Matoaka route must be used, and it would be prevented from accomplishing large economies in operating expenses.

(5) *The Wharncliffe Line is necessary to enable the Norfolk Company to participate in the coal, lumber and other traffic originating along or destined to points on the Virginian's new lines in the Guyandot Valley.*

An important use, already considered, of the Virginian's new line in the Guyandot Valley, is for the more economical transportation of coal originating on existing lines of the Virginian in the upper Guyandot Basin and now moving to the west via existing routes. Another use for that line is for the development and movement of the resources of the tributary territory, of which coal is the most important, and lumber second in importance.

Witnesses for each of the three carriers testified to the resources of that territory tributary to a line between Gilbert and Itmann, and the traffic expected. For the Norfolk Company, Witness Dunglinson (R. pp. 224-6) testified that there are approximately 390 square miles of tributary territory, all underlaid with coal, and estimated that the minable coal in that area amounts to 470,000,000 tons of high volatile coal and 410,000,000 tons of low volatile coal. Other witnesses estimated the timber resources of that territory (R. p. 35).

Mr. Dunglinson also estimated that the ex-

The Appellant does not challenge these facts but rather confesses and seeks to avoid them, thus:—

A. The Wharncliffe line will continue the Norfolk Company an active competitor of the Chesapeake, although that competition, the Chesapeake Company asserts, has not been shown to be required by the public convenience and necessity.

The Congress has, in Paragraph (4) of Section 5 of the Interstate Commerce Act, declared its policy to preserve competition as fully as possible. The construction of the Gilbert-Wharncliffe line will preserve existing carrier competition.

B. The Chesapeake Company relies upon the theory, exploded by the evidence (*supra*), that the Wharncliffe line is "poor," "wasteful" and like adjectives.

C. The Appellant contends that promotion of competition is not, in law, a sufficient consideration for granting a certificate for the construction of a new line; and asserts that the promotion of competition was the sole ground upon which the Commission awarded the certificate. This is urged by Appellant as an erroneous conception and theory of the law.

The creation of new competition may, in a

particular case, be a matter of public interest sufficient alone to warrant a certificate. The preservation of existing competition in accord with the declared purpose of Congress alone may justify the Commission in awarding a certificate for the construction of a new line.

In PENNSYLVANIA R. CO. v. UNITED STATES, 40 Fed. (2d) 921, (decided May 24, 1930) the District Court said:—

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing

pectable coal traffic to be originated along the new line by the end of five years after the line is completed will amount to 1,500,000 tons of low volatile, and 500,000 tons of high volatile coal per annum (R. p. 225). The various estimates of coal traffic and other freight from and to points on the new line are summarized by the Commission in its report (R. p. 44).

The record shows that for years, (since 1901), the Norfolk Company has contemplated developing, at the proper time, the resources of the Guyandot Valley, by the construction through a subsidiary of a line of railroad in that valley (R. p. 205-7). It purchased, in 1901, the stock of the Pocahontas Coal & Coke Company, which has large holdings of coal lands in the Pocahontas field (R. p. 206), including 119,500 acres (or about 40.6 per cent. of its total acreage) in the Guyandot River watershed, 82,500 acres being in the territory tributary to the Itmann-Gilbert line now under construction by the Virginian (R. p. 224). Of the 78,500 acres of land containing low volatile coal in that territory (there is a better market for low volatile coal and these deposits will probably be developed quickest), 52,500 acres, or 67 per cent., are owned by the Pocahontas Company (R. p. 224). The declared purpose of that purchase was to make the Norfolk Company "secure in its coal and

coke traffic which already forms so large a portion of the Company's business" (R. p. 207). As a part of its plans, the Guyandot & Tug River Railroad Company was chartered in 1903, to build a line of railroad in the Guyandot Valley and over to Wharncliffe (R. p. 206). That company acquired and for years has owned nearly all of the land necessary for its right of way between Elmore and Gilbert (R. p. 211), and had spent to the date of the hearing approximately $263,000 in acquiring that right of way, for engineering, and so forth: (R. p. 211), in addition to the investment by the Norfolk Company in acquiring the Pocahontas Coal & Coke Company.

The Commission made an administrative finding that the Norfolk Company should be permitted to compete for the traffic to be originated in that territory on an equal footing with the Chesapeake, and that the Norfolk Company should not be entirely excluded from participation in that traffic. The Norfolk Company can participate only in the event the Gilbert-Wharncliffe line is built. The coal in the Guyandot Valley and in the Horsepen area is so far to the northwest that a route through Matoaka would involve a back-haul and impracticable operating conditions.

That the Commission had these facts in mind in authorizing the construction of the Gilbert-Wharncliffe line seems clear from the detailed recital in its report (R. pp. 51-2) of the facts of the organization, acquisition, history, etc., of the Pocahontas Coal & Coke Company and the Guyandot & Tug River Railroad Company, and its specific finding that

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west. The N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe." (R. p. 57.)

The District Court, after quoting that language, makes this comment upon that phase of the justification of the Gilbert-Wharncliffe line (R. pp. 94-5):—

> "As heretofore set out, the N. & W. is the owner of a very great acreage of land in the Guyandot Valley and has been such owner for at least 28 years, and had contemplated developing the same whenever the necessity therefor should appear, and has

spent a large sum of money in maintaining rights of way and in engineering and other matters necessary for the proposed construction of a railroad in the Guyandot Valley, and the declared purpose of the purchase of this large quantity of land was to make the N. & W. 'secure in its coal and coke traffic which already forms so large a portion of the company's business.' If the N. & W. refused to permit the development of its lands in this valley unless all the products thereof that go west were returned east to its branch line at Matoaka and then hauled west over its main line, it would seriously interfere with the expected business of the Virginian Railway and would be an uneconomical way of taking these products to market. The I. C. C. evidently reached the conclusion that, by the burden of the ownership of this large body of land for this great length of time, certain rights accrued to the N. & W., and in our opinion equity, at least, requires agreement with such conclusion (R. p. 57).

"The desirability of competitive service for the purpose of hauling the products of this Guyandot Valley to market certainly seems to have been considered by the I. C. C. in awarding the certificate for the construction of the Gilbert-Wharncliffe Line, and it seems to us that the fact that it was so considered is clear from its report."

(6) *The Wharncliffe Line is necessary to prevent the bottling up of the Virginian by having only one active Western outlet at Gilbert.*

The District Court said (pages 776-777):—

"As heretofore shown, The Virginian is a trunk line railroad extending from Hampton Roads, Va., to and ending into the coal fields of Southern West Virginia. The I. C. C., in the case of Control of Virginian Railway, 117 I. C. C. 67, refused to approve the proposed lease of its properties to the N. & W. We think that the right construction of this act of the I. C. C. is to believe that the Virginian should be preserved independently of the two other major coal-carrying lines in that vicinity.

"The I. C. C. also required (VIRGINIAN RAILROAD v. UNITED STATES, *et al.*, 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463) '* * * the establishment of joint rates on coal to the west and the evidence in the case was that that traffic is or will in the future be an important part of the Virginian's total traffic.'

"The I. C. C., by awarding the certificate for the Itmann-Gilbert line to the Virginian, apparently endeavored to give it a more suitable and effective outlet to the west. But it would still be bottled up if the only connection at Gilbert was with the C. & O., and the authorization of the Gilbert-Wharn-

cliffe line seems to have been a means, in the minds of the members of the commission, to prevent such condition. The I. C. C. evidently considered the Gilbert-Wharncliffe certificate as a corollary to the certificate awarded the Virginian, and its construction is a necessary part of the very theory and object of the I. C. C. in the development of the Virginian as an independent trunk-line carrier (R. pp. 56-7).

"In the report in this case the I. C. C. lays real stress on the fact that the coal reserves of the C. & O. and N. & W. are much greater than those of the Virginian, and also lays stress on the fact that the coal reserves of the C. & O. are likewise much larger than those of the N. & W.

"From the Ohio river, at Kenova and Huntington respectively, run the lines of the N. & W. and C. & O. southeast along the valley of the Big Sandy river and the Guyandot river. The N. & W. leaves the state near Bluefield (about 180 miles from Kenova), and the C. & O. stops at Gilbert, more than 90 miles from its main line, and there is no cross railway between them for those long distances. The same condition will prevail when the Virginian is finished from Itmann to Gilbert on its line of more than 40 miles. We are of opinion that it is to the interest of the Public within that long distance to have a cross line for the purpose of carrying freight and passengers

of local people from one railway to the other without the necessity of making these long hauls to the Ohio river on one railway and then back up the other when the distance between these railways in these two valleys is so short."

The location of the lines of the three carriers is described by the Commission (R. pp. 33-4).

The Commission stated that "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down the Guyandot River and it is not desirable to put the ownership of the line through this narrow-mountain valley or gorge under the control of one of its competitors" (R. p. 56).

The Commission also stated (R. p. 57) that the certificate to the Norfolk Company for the Wharncliffe Line "would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west" (R. p. 57).

Appellant's Brief (pp. 25-6—sub-division 2 (*e*)) treats as a "finding" of the Court the statement (R. p. 96) of opinion "that it is to the interest of the public within that long distance" (about

150 miles) "to have a cross-line for the purpose of carrying freight and passengers of local people from one railway to the other without the necessity of making these long hauls to the Ohio River on one railway and then back up the other when the distance between these railways in these two valleys is so short."

This has reference to the Wharncliffe Line as a cross-line connecting the Virginian and Chesapeake in the Guyandot Valley with the Norfolk in the Tug Valley. The Appellant's Brief (pp. 25-6) makes complaint:—

> "(1) that the Commission found shipments of coal to local points east of Kenova to be negligible (R. 38-9), (2) that the record fails to disclose the existence of any movement of either passengers or merchandise from one valley to the Ohio and thence back to the other valley and (3) that there is no evidence whatever of any need or even request, for interchange between the valleys by rail of either passengers or freight of any character whatever."

As to (1), existing shipments of coal to local points east of Kenova on the Norfolk Line cannot measure the usefulness of a cross-line not now in existence. As to (2), the problem isn't the volume of the traffic now moving via the junction on the Ohio River but is rather a question of

furnishing a cross-line that will be a convenience and encourage that traffic in the future; and there is evidence with regard to the prospective movement of general merchandise traffic over the route of the new line to destinations in the Guyandot Valley and to points on existing lines of the Virginian in the coal fields (R. pp. 215-6). The possibility of using the proposed line for the development of business from one valley to another is referred to (R. p. 216) specifically as to jobbing from Williamson, W. Va. As to (3), the geographical conditions justify the Court's observation that the cross-line may be a public convenience and necessity in the future.

II.

The Chesapeake Company Has No Legal Right Affected By the Certificate and Order of the Commission Sought to be Enjoined.

As Point 5 in the Summary of Argument (p. 46 of Appellant's Brief) and Point 3 of the Argument (p. 65 of Appellant's Brief) the Appellant argues that it "has such an interest in the consequences of the action of the Commission in authorizing the Gilbert-Wharncliffe line as to subject it to irreparable injury of a character which the Courts should prevent."

The Appellant's Brief (pp. 67-68) cites in this context three decisions of this Court.

The first case is PIEDMONT & NOR. RY. v. UNITED STATES, 280 U. S. 469. In that case the Piedmont & Northern Railway had applied to the Commission for a certificate under Paragraph (18) of Section 1. The Commission by order denied the application. Thereupon the Piedmont & Northern sought to have the Commission's order set aside on the ground that the subject matter was beyond the Commission's jurisdiction. The Court observed that if the order was beyond the Commission's jurisdiction, as contended "then obviously the order is no obstacle to the railway's plans" and that "what plaintiffs are seeking is, therefore, in substance, a declaratory judgment," and refused the relief prayed.

The second case relied upon by appellant is the CHICAGO JUNCTION CASE, 264 U. S. 258. That case arose from an application under Paragraph (2) of Section 5 of the Interstate Commerce Act governing control of one carrier by another and authorizing the Commission to approve if control "will be in the public interest." The present proceeding is referable to a different statute, Paragraph (18) of Section 1. At page 262 this Court stated that the order in the CHICAGO JUNCTION CASE "was entered solely under para-

graph 2 of section 5" and added "We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of section 1, or rights thereunder."

Moreover, the Court observed that the arrangement authorized by the Commission and sought to be enjoined had for its main purpose the acquisition by the New York Central Railroad of a larger share of the Chicago business, a plan by that railroad "to obtain traffic theretofore enjoyed by its competitors" who sought to enjoin the order. The decision seems an unhappy one for the Appellant.

The third case cited is TEXAS & PAC. RY. COMPANY V. GULF, ETC., RY., 270 U. S. 266. In that case the construction of an extension was attempted by the carrier without securing a certificate of the Interstate Commerce Commission: p. 271. An injunction was granted to the Texas & Pacific Railway Company as required by Paragraph (20) of Section 1, which provides that any construction contrary to the provisions of Paragraphs (18), (19) and (20) of Section 1 may be enjoined at the suit of any "party in interest." In the case at Bar a certificate was applied for, and after hearing was issued, and the special statutory remedy under Paragraph (20) affords no analogy.

This case also may be differentiated from the case at bar because there the plaintiff, Texas & Pacific Railway, already served with its rails the district sought to be reached by the line in controversy, and the Court found that the proposed line would divert from it traffic estimated at more than $500,000 a year. In the present case the Wharncliffe Line will not take from the Chesapeake Company a single ton of freight or one passenger which it has heretofore enjoyed.

In the case at bar, the Chesapeake Company, in Finance Docket No. 4818, applied to the Commission under Paragraph (18) of Section 1 of the Interstate Commerce Act for a certificate of public convenience and necessity. That application was denied. The Commission authorized the Virginian Company to construct a new line from Gilbert to Itmann, occupying the very territory into which the Chesapeake Company sought to extend its lines. The Chesapeake Company has acquiesced in the certificate issued to the Virginian Company; and it is thus adjudicated that the Chesapeake Company has been excluded from the Guyandot Valley above Gilbert.

The Norfolk Company is the only carrier which has ever proposed a line from Gilbert to Wharncliffe. The Chesapeake Company is in the posi-

tion of seeking to prevent construction of a new line of railroad by the Norfolk Company through a territory not now traversed by any railroad, without itself proposing to provide transportation facilities there.

There is no proof in the record that the construction of the Gilbert-Wharncliffe line will take from the Chesapeake Company any traffic now originating on or moving over its line. The Chesapeake Company will be benefitted by the construction authorized by the Commission. Instead of being a dead-end branch ending at Gilbert, its Logan sub-division will connect at that point with the new lines of the Virginian and the Norfolk Companies. Instead of being deprived of traffic now moving over its rails, the Chesapeake Company may reasonably expect to secure in interchange at Gilbert some of the coal traffic originating on the new line or the old lines of the Virginian Company.

Even with the construction of the line now sought to be enjoined the Chesapeake Company expects to receive at Gilbert half of the available traffic, and its estimate of irreparable injury is based upon the theory that it would not be able also to divert to its lines the other half of the available traffic! (R. p. 245). Appellant's claim of legal injury rests upon the proposition that,

even though the Commission's certificate and order will improve its condition, the benefits would be still greater if one part of the order is permitted to stand and another part is enjoined, so that appellant would in the future be able to take from its competitor traffic which in the past has moved over the competitor's lines, and exclude that competitor from participation in new traffic.

The case of PENNSYLVANIA R. Co. v. UNITED STATES, decided May 24, 1930, 40 Fed. (2d) 921, was a bill praying an injunction against an order of the Commission which had authorized the Pittsburgh & West Virginia Railway Company to construct a branch six miles in length from its Connellsville Extension into Donora and to an important plant there already exclusively served by The Pennsylvania Railroad Company. This branch would necessarily, to the extent that it secured traffic from the industry, have reduced the Pennsylvania's existing business. The District Court observed that the Pennsylvania was entitled to intervene and be heard before the Commission as it had done. But the Court denied the injunction and dismissed the bill, saying on this point:—

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from hand-

ling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade-mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in. Where, as here, the showing is lawfully made and the Commission has validly acted, the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury. In consequence it has nothing on which to sustain an independent suit to vacate and set aside such an order of the Interstate Commerce Commission."

That was a closer case than the present one because existing traffic of the complaining carrier would be switched to the newly constructed

line. The newly constructed railroad would invade territory theretofore served by another and take traffic which that other railroad already enjoyed. Here that will not happen.

In the case of SPRUNT & SON v. UNITED STATES, 281 U. S. 249, the appellants were shippers who had enjoyed certain rate advantages over their competitors. The Commission found that those advantages created undue preference and prejudice, and ordered them discontinued. The interested carriers acquiesced in the finding and order, but the shippers who had previously enjoyed those advantages brought suits to enjoin and set aside the Commission's order. On appeal this Court said:—

> "The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under §3 of the Interstate Commerce Act." (49 U. S. C. A. Sec. 3). "For their competitive advantage was threatened. Having this in-

terest, they were entitled to intervene in that administrative proceeding, and, if they did so, they became entitled under §212 of the Judicial Code" (28 U. S. C. A. Sec. 45a) "to intervene, as of right, in any suit 'where is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

This point is jurisdictional of the parties and may be made at any stage of the case. The decree of the District Court, refusing the injunction and dismissing the bill, should be affirmed without regard to the other questions.

III.

(Assignment of Error VIII; R. p. 255 referring (by mistake) to Assignment VII).

The Certificate of 23 July, 1928, in one order disposed of the whole subject of the public convenience and necessity in the matter of new construction of railroad in the entire area. The inter-related problems determined in the report and by the order cannot be severed for piece-meal litigation. No Error.

(See (3) pp. 26-27, Appellant's Brief.)

This point was argued on Brief and orally in the District Court and will be argued here by

Counsel for the United States and the Interstate Commerce Commission. We leave the point to them with brief suggestion of some developments in the case before the Commission that bear upon the unity of the order as a railroad problem.

The unity of an order granting a construction certificate can hardly be tested by considering whether the Virginian Company or the Norfolk Company could respectively have declined to build each its portion of the through Line from Itmann via Gilbert to Wharncliffe. Such orders are necessarily permissive, not compulsory. Paragraph (18) wouldn't authorize the Commission to enter a compulsory order. If the Virginian, for instance, had built only from Itmann to Pineville, about half the Line authorized, and had failed to connect with the Norfolk and the Chesapeake Companies at Gilbert there would have been no penalty incurred by the Virginian.

In the beginning the Norfolk and Virginian Companies made application to the Commission jointly as one Line and this (F. D. No. 5161) is the application which the Commission granted to the Norfolk Company for the Wharncliffe Line (R. p. 240).

The problem of railroad service for the public convenience and necessity remained one and indivisible from Itmann to Wharncliffe, a distance

of some 53 miles of mountain country then without railroad service.

The Commission in one report and order authorized the construction by the Virginian Company of the line between Itmann and Gilbert, by the Norfolk Company of the line between Gilbert and Wharncliffe, and denied the Chesapeake Company's application. The lines authorized were to solve the problems presented to the Commission, *i. e.*, how best to provide new transportation facilities for the development of and railroad service in territory not heretofore served by any railroad and to provide more advantageous routes for the movement of existing traffic. The two lines are to be built by different companies and are inter-related and designed to accomplish those purposes. Neither can be fully effective without the construction of the other. The Virginian Company supported before the Commission the Norfolk's application for the construction of the line now sought to be enjoined because "without the Gilbert-Wharncliffe line of the Norfolk and Western, the new line" (of the Virginian) "will not have its fullest and most advantageous use." The order may not be set aside in part, for this would substitute some different plan for that which the Commission,

in the exercise of its administrative discretion, has decided will be required for the present and future public convenience and necessity.

The decree should be affirmed.

Respectfully submitted:

JOHN H. HOLT,
ROBERT E. McCABE,
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THEODORE W. REATH,
Attorneys for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees.

DECEMBER, 1930.

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CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States.

No. 73 of October Term, 1930.

Chesapeake and Ohio Railway Company,
Plaintiff-Appellant,

v.

United States of America, Guyandot and Tug River Railroad Company, and Norfolk and Western Railway Company,
Defendants-Appellees.

RAILWAY CONSTRUCTION SINCE CASE WAS HEARD IN THE DISTRICT COURT.

A change in the status has occurred since the case was presented in the District Court. No

supersedeas was obtained. The Order of the Commission has been in effect since November 1, 1928. The Norfolk Company acted upon the faith of the Order and could not have done otherwise if its rights thereunder were to be preserved.

Has the case become moot or inappropriate by the changed conditions for the exercise of the equitable power of the District Court? The facts which we are now to present are stated as bearing upon these problems.

This case was heard, argued and submitted in the District Court January 2, 1929, and submitted to that Court by agreement of all the parties by Counsel "for its decision as on final hearing": R. p. 80. The prayer of the petition of the Chesapeake Company for a preliminary injunction was thus abandoned, and no interlocutory order and injunction *pendente lite* or *supersedeas* was allowed.

The petition of the Chesapeake Company was filed in the District Court December 8, 1928: R. p. 1.

The order of the Commission granting a certificate to the Virginian Company for the Line in the Guyandot Valley and to the Norfolk Company for the connecting Line from Gilbert to Wharncliffe was dated July 23, 1928: R. p. 239; on petition of the Chesapeake Company the effec-

tive date was postponed for 30 days by an order entered August 20, 1928, and further postponed to October 22, 1928, by an order entered September 5, 1928: R. pp. 241-242.

The petition of the Chesapeake Company for reconsideration and reargument was denied by order dated 1 October, 1928: R. pp. 242-3; and by an order dated 20 October, 1928, a further petition of the Chesapeake Company for reconsideration and reargument as to the certificate for the Gilbert-Wharncliffe Line was postponed in effective date to November 22, 1928: R. p. 243.

The final order of the Commission, dated 1 November, 1928, denied the further petition of the Chesapeake Company and directed that the order of July 23, 1928, should "take effect and be in force from and after" November 1, 1928: R. p. 244.

The order of the Commission, dated July 23, 1928, granted a certificate to the Virginian Company for the Line in the Guyandot Valley and to the Guyandot Company, a subsidiary of the Norfolk Company, for the Line from Gilbert to Wharncliffe. These certificates were granted in the same order of the Commission and both were conditioned that "said line of railroad shall be commenced on or before January 1, 1929, and be completed on or before December 31, 1931."

In order to avail themselves of the authority granted by the Commission's order of July 23, 1928, the Virginian and Norfolk Companies were required to commence construction on or before January 1, 1929. Construction was accordingly commenced by both Companies prior to January 1, 1929, and has been prosecuted since then so that the whole railroad project will be completed and ready for operation by the time limit allowed both Companies—namely, on or before December 31, 1931.

The Line authorized for construction by the Virginian Company was some 43 miles in length from Itmann to Gilbert: and the connecting Line authorized for construction by the Norfolk Company was 10.5 miles in length from a connection with the northwest end of the Virginian at Gilbert to the main line of the Norfolk Company at Wharncliffe.

The Virginian construction was prosecuted from the northwest end of its Railroad at Itmann down the Guyandot Valley toward Gilbert: and the Norfolk Company's construction, which included a 4400 foot tunnel, was prosecuted from both ends.

The Virginian Company has expended to October 20, 1930, the sum of $2,300,000. The grading and bridge work have been completed from Itmann for a distance of 24 miles, and

rails have been laid for a distance of 20 miles. From the end of the grading to Gilbert, a distance of 19 miles, the grading was about 20% completed. The construction of the Line was approximately 50% completed.

These data are given as of October 20, 1930, since which date the work has progressed further.

The Norfolk Company has expended to October 20, 1930, the sum of $1,695,000. The grading is 90% completed, the part remaining to be done being practically all located in the vicinity of Gilbert. The masonry and bridge work have been completed. The heading of the tunnel has been driven and 70% of the tunnel excavation accomplished. The roof of the tunnel has been timbered throughout, and the sides have been timbered as far as the excavation extends. Track has been laid from Wharncliffe, the junction with the Main Line of the Norfolk Company, up to a point within 1800 feet of the tunnel, this being about 4¼ miles of Main Line laid out of a total of 10½ miles. The track work is about 35% completed; and the total work approximately 60% completed.

These data are given as of October 20, 1930, since which date the work has progressed further.

This paper will be filed and copies handed Counsel for the Chesapeake Company, for the

United States, and for the Interstate Commerce Commission in the cause sufficiently in advance of the cause being reached for oral argument to give opportunity for answer.

Respectfully submitted,

JOHN H. HOLT,
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THEODORE W. REATH,

Of Counsel for Guyandot and Tug River Railroad Company and Norfolk and Western Railway Company, Defendants-Appellees.

DECEMBER, 1930.